IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.547 OF 2006

Baban Popat Magar
Smt.Dwarkabai Popat Magar
Sou.Dhondabai Ramhari Nagane
Sou.Rangubai Prabhakar Kapse
Sou.Lalubai Kama Pawar ...Appellants

vs.

Bhagwat Lakshaman Magar
Manik Lakshman Magar
Appa Lakshman Magar ...Respondents

Mr.K.B.Sonwalkar for the Appellants
Mr.Sandeep Salunkhe for Respondent Nos.1 to 3.

CORAM: A.S.OKA,J.
DATE : JULY 19, 2007.

ORAL JUDGMENT:

1. Heard learned Advocates for the parties. The Appellants are the original Plaintiffs and the Respondents are the Defendants. According to the case of the Appellants, a land bearing Gat No.402 of village Garad is their ancestral property. The Respondents are the owners of the land bearing Gat No.404 which is situated on the eastern side of the property of the Appellants. The case of the Appellants is that the Respondents have committed an encroachment on the suit property to the extent of 21 are after disturbing the Bandh between the two properties. According to the case made out by the Appellants, the survey and measurement was carried out by the Taluka Inspector of Land Records on 11th March 1993 which established the encroachment to the extent of 21 ares.

2. A suit for removal of encroachment was filed by the Appellants. The suit was contested by the Respondents. It was specifically contended that the Respondents were not aware about the survey and measurements carried out by the T.I.L.R. The Respondents denied to have encroached upon the suit property. The Trial court decreed the suit by accepting the case made out by the Appellants. The Appellate Court has reversed the decree in the Appeal preferred by the Respondents. The Appellate Court held that the perusal of the map drawn by the surveyor shows that the survey and measurement was carried out only in respect of the property of the Appellants bearing Gat No.402. The Appellate court observed that though the 7/12 extracts in respect of the land bearing Gat No.402 shows existence of four Neem trees and tree of Kekar on the said Bandh, the surveyor's report is silent about the same. The Appellate Court observed that mere measurement of Gat No.402 was not sufficient and in fact a survey ought to have been carried out after notice to all the holders of adjoining lands. The court observed that a survey and measurement of the land bearing Gat No.404 was necessary.

3. While deciding at the Appeal preferred by the Respondents, the Appellate Court observed that the evidence adduced by the Respondents was not satisfactory. The Appellate Court has also referred to the plea of adverse possession raised by the Respondents. The Appellate Court observed that the

Respondents ought to have come out with a specific plea.

4. After the Appeal was argued for admission, a suggestion was made by the Court to the learned Advocates for the parties that considering the controversy involved between the parties, it is desirable to order a fresh survey and measurement of the properties claimed by both the parties. After taking instructions from the representatives of the parties, the learned Advocates appearing for the parties state that the said course can be adopted by passing an order of remand. The submission of the Advocate for the Respondents is that survey of both the properties will have to be carried out after notice to all the holders of adjoining properties. There is a merit in the said submission.

5. The Appellants have alleged that they are the owners of the land bearing Gat No.402 and the Respondents are entitled to the land bearing Gat No.404. It has come on record that the land bearing Gat No.404 is now sub divided into three sub divisions i.e. Gat No.401/1 to 3. Both the properties will have to be surveyed as essentially the dispute is regarding the boundary between the two properties.

6. Hence I pass the following order :

i) Impugned Judgment and Decree dated 10th March 2006 passed by the Additional District Judge, Malshiras, District

Solapur is quashed and set aside and the Civil Appeal No.158 of 2004 is restored to file.

ii) Parties are directed to appear before the learned Additional District Judge, Malshiras, District Solapur on 27th August 2007 at 11.00 a.m.

iii) The leaned Additional District Judge, Malshiras will appoint the T.I.L.R., Taluka Malshiras, District Solapur as a Court Commissioner.

iv) The Court Commissioner will carry out the survey and measurement of the land bearing Gat No.402 as well as Gat No.404/1 to 404/3 of village Garad. The work of survey will be carried out by the Court Commissioner after giving notice to all the parties to the Appeal as well as to the holders of the adjoining properties and submit a report. It is obvious that while submitting the report, the Court Commissioner will take a note of the alleged Bandh between the two boundaries and the trees, if any, in existence on the properties.

v) After the Court Commissioner submits his report and a survey map, the Appellate Court will decide the Appeal afresh in accordance with law. It is obvious that the parties will be permitted to raise an objection in

writing to the report of the Court Commissioner and to the map drawn by him. If the parties so desire, the Appellate Court will permit the examination of the Court Commissioner on oath. It is made clear that the Appellate Court will not remand the matter to the trial court for that purpose.

vi) The Appeal is partly allowed in above terms with no order as to costs.

vii) All contentions of the parties on merits of the Appeal are kept open.

viii) Parties and the concerned Court to act upon an authenticated copy of this order.

JUDGE